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Comment

Plea Bargaining and Trial Penalties: When May the State Legitimately Require Criminal Defendants to Surrender Their Trial Rights

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In the recent plea bargaining case of *Corbitt v. New Jersey*,[1] the Supreme Court of the United States upheld harsher punishment for defendants convicted at trial than for defendants who plead guilty. The Court also authorized the use of punishment to induce guilty pleas in a way that would make pleading guilty more attractive than standing trial to all but the worst offenders and compulsive gamblers. The Court relied on inappropriate precedent to create a Hobson's choice for criminal defendants: plead guilty or forego any chance of receiving mercy. This article will examine how the Court improperly analogized penalty-induced guilty pleas to *Crampton v. Ohio*,[2] wherein a state was permitted to require a defendant to give up either the privilege against self-incrimination or the right to give testimony relevant to mercy; it will also discuss the Court's ill-considered extension of *Bordenkircher v. Hayes*,[3] which, because it required the prosecution to bargain, failed to present the same dangers as a *Corbitt* plea bargaining system. *Corbitt* thus seriously undermines the right to a trial; it may also portend the end of the adversary system of criminal justice as it has been known.

In *Corbitt* the state failed to show any need to reduce the incidence of presumably futile criminal trials where a guilty verdict is a foregone conclusion. Absent this showing of need, the Supreme Court should not have authorized the use of severe trial penalties to erode the adversary system of criminal justice; less extreme measures might adequately control presumed useless trials. Moreover, even if a severe trial penalty system for administering criminal jus-

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[1] 438 U.S. 212 (1978).

[2] 402 U.S. 183 (1971), *vacated in part*, 408 U.S. 941 (1972) (death penalty vacated following the rejection of standardless imposition of the death penalty by Furman v. Georgia, 408 U.S. 238 (1972)).

[3] 434 U.S. 357 (1978).

tice is permissible, there ought to be minimum safeguards to protect the defendant. *Corbitt* failed to require these safeguards, and thus improperly disposed of a defendant's fundamental right to trial.

In murder cases, such as *Corbitt*,[4] New Jersey does not allow bench trials, nor does it technically permit guilty pleas.[5] An accused charged with murder, however, may plead non vult or nolo contendere.[6] These pleas are substantially the same as a guilty plea in jurisdictions which allow guilty pleas in murder cases, because each effectuates a surrender of the defendant's right to trial.[7]

The acceptance of a plea of non vult or nolo contendere to a murder indictment in New Jersey requires the trial court to determine that there is a factual basis for conviction.[8] Acceptance of the plea is discretionary, and the plea cannot be accepted if the defendant maintains his innocence, stands mute or refuses to admit the facts that establish guilt.[9] Upon acceptance of the plea in a murder case, the court need not determine whether first or second degree murder is established[10] and may imprison the defendant for life or impose the punishment for second degree murder, which is imprisonment for not more than thirty years.[11]

A New Jersey first degree murder defendant, however, who prefers being tried to pleading guilty loses any chance of receiving mercy if he is convicted. A trial conviction requires a mandatory life sentence.[12] Plea bargaining under the auspices of the court is allowed in New Jersey.[13] Further, a defendant may withdraw a guilty plea made pursuant to a plea bargain which the court rejects.[14] On the other hand, the prosecutor is not required to bargain with a defendant even though the defendant may deserve mercy. The majority opinion in *Corbitt* said that as far as the record disclosed, the defendant might have made a plea offer which was refused.[15] It is also possible that something completely different happened. Ini-

[4] The indictment in *Corbitt* charged defendant with two counts of arson and one count of murder committed in the course of an arson. The victim, a visitor at the dwelling, died of smoke inhalation. The defendant pled not guilty and was subsequently convicted by a jury for first degree murder. He was sentenced to a mandatory term of life imprisonment. *Id.*

[5] *Id.* at 215.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 215-16.

[9] *Id.* at 215 n.3.

[10] *Id.* at 216.

[11] *Id.* at 215.

[12] *Id.*

[13] *Id.* at 222 n.11, 225 n.15.

[14] *Id.* at 222 n.11.

[15] *Id.* at 223.

tially, the prosecutor might have completely refused to plea bargain; then he might have told the defendant either to plead guilty and hope for mercy from the court or to take his chances at trial of escaping a mandatory life sentence. Whatever might have happened, New Jersey law allows the prosecutor to confront the defendant with just such a choice: either make a blind guilty plea[16] with only a mere possibility for leniency, or receive a mandatory life sentence for a trial conviction. The United States Supreme Court approved the choice in a six to three decision with one of the majority judges concurring in the result, but not the reasoning.

THE *Corbitt* PLEA BARGAINING SYSTEM AND ITS ANTECEDENTS

Corbitt takes the bargaining out of plea bargaining. The prosecutor does not have to bargain but rather can insist upon the defendant's unconditional surrender. Thus, *Corbitt's* plea bargaining system is not likely to elicit guilty pleas from defendants with no chance of receiving mercy. If some of these defendants decide nonetheless to plead guilty, it will not be because mercy induced their guilty pleas. On the other hand, the plea bargaining system is likely to induce guilty pleas from those who deserve mercy and might be acquitted if they went to trial. *Corbitt* advises this kind of defendant, however, to insist upon trial if he is dissatisfied with the state's offer.

The trouble with this advice is that a state can always structure its penalties to make pleading guilty preferable to standing trial[17] for a defendant who deserves mercy. Once a *randomly* selected punishment increase becomes acceptable as a device for inducing guilty pleas, there is no way to stop its maximum effective use in inducing defendants to forego the right to stand trial. Maximum punishment, especially for intermediate felonies, can be reserved exclusively for those who are tried and convicted. In these circumstances, defendants who deserve mercy will plead guilty in order to receive comparatively lenient punishment. Trial will become the prerogative of those who have nothing to lose. They will primarily be the worst offenders among those who commit a particular felony. Trial may

[16] State v. Corbitt, 74 N.J. 379, 416, 378 A.2d 235, 254 (1977) (Pashman, J., dissenting), *aff'd*, 439 U.S. 212 (1978).

[17] *Cf.* Ramsey v. New York, 99 S. Ct. 1415 (1979) (where the writ of certioari was dismissed because it was improvidently granted). In *Ramsey* the defendant claimed that his sentence was induced by a judge's threat to more than double the sentence proposed in a plea offer and to approximately quadruple a sentence considered earlier.

also attract a few adventurous souls willing to take *Corbitt's* all or nothing gamble.

The *Corbitt* majority relied primarily upon two cases, *Crampton v. Ohio*[18] and *Bordenkircher v. Hayes.*[19] The majority also distinguished *United States v. Jackson,*[20] which invalidated the death penalty in the federal kidnapping law because use of the penalty was reserved exclusively for defendants convicted by a jury. *Bordenkircher* upheld a mandatory life term for an habitual offender who improvidently refused the prosecutor's offer of a five year prison sentence for his last offense, uttering a forged instrument in the amount of $88.30. *Jackson* and *Bordenkircher* will receive a more thorough discussion below following consideration of the Court's reference to *Crampton v. Ohio,* which involved the use of mercy in capital murder cases.

Crampton v. Ohio: Permissible Burdens on the Exercise of a Constitutional Right

The majority in *Corbitt* cited *Crampton* for the indisputable proposition that "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[21] They also discussed this proposition and *Crampton* in a footnote[22] which examined the validity of occasionally confronting the criminal defendant with hard choices, such as requiring him to give up either the right against self-incrimination or the right to testify for mercy. The *Corbitt* majority, however, overextended *Crampton* if they meant to suggest that it would permit the choice presented to a criminal defendant in *Corbitt,* between a trial but no mercy, or a possibility of mercy but no trial.

Crampton neither allows nor prohibits this choice. Although a plea of innocence is usually incompatible with a plea for mercy, this may not always be true. It would seem that self-defense, insanity and mercy might occasionally travel hand-in-hand. There might be other situations where the incompatibility between innocence and mercy might not be so great and the defendant would prefer to try for both in the same proceeding rather than to give up one or the

[18] 402 U.S. 183 (1971), *vacated in part,* 408 U.S. 941 (1972) (death penalty vacated following the rejection of standardless imposition of the death penalty by Furman v. Georgia, 408 U.S. 238 (1972)).

[19] 434 U.S. 357 (1978).

[20] 390 U.S. 570 (1968).

[21] 439 U.S. 212, 218 (1978).

[22] *Id.* at 218 n.8.

other. *Crampton* leaves the defendant an opportunity for both. Consequently, it does not support the *Corbitt* result which forces the defendant to choose one or the other.

The *Crampton* case, in itself, does not preclude the result in *Corbitt,* however. In *Crampton,* guilt or innocence, and punishment were determined by a jury in a single proceeding. Conviction meant death unless the jury recommended mercy.[23] Ohio law was unclear whether evidence relating only to punishment was admissible in capital murder cases.[24] No evidence offered by the defendant in *Crampton,* however, was excluded on the ground that it was relevant only to punishment.[25] Ohio allowed the defendant to "put before the jury a great deal of background evidence with at best a tenuous connection to the issue of guilt."[26] In the *Crampton* case the jury considered only evidence that was relevant to both guilt or innocence, and punishment.

The defendant challenged the validity of using a single rather than a bifurcated proceeding to decide both issues, claiming that resolving both guilt or innocence and punishment in a single proceeding compelled him either to surrender the privilege against self-incrimiation or the right to give testimony relevant to mercy.[27] After assuming arguendo that the latter right was constitutionally protected, a majority of six judges ruled against him.

The Court decided that it was immaterial to the defendant's claim whether he testified or chose not to testify because he would be cross-examined about guilt or innocence if he testified about punishment. Essentially, the defendant's claim was that he must be allowed to testify and to limit the effect of his testimony to the issue of punishment. The Court held that neither the privilege against self-incrimination nor the right to testify for mercy permits a defendant who chooses to take the stand to limit the relevant uses of his testimony or the issues about which he will testify.[28]

Because *Crampton* assumed that the defendant had a constitutional right to testify and present evidence about mercy in a captial case[29] it is not particularly helpful in deciding whether the state can

[23] Crampton v. Ohio, 402 U.S. 183, 195 (1971), *vacated in part,* 408 U.S. 941 (1972) (death penalty vacated following the rejection of standardless imposition of the death penalty by Furman v. Georgia, 408 U.S. 238 (1972)).

[24] *Id.* at 219.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 211.

[28] *Id.* at 214, 220.

[29] *Id.* at 218-19.

deny mercy to defendants who choose to be tried where the right to mercy is *not* constitutionally protected.

Further, *Crampton* would not support a law requiring the defendant to choose between mercy and a trial in a capital case, for the right to mercy in a capital case is now a fundamental right.[30] *Crampton v. Ohio,* however, actually held that due process permitted the jury to make a standardless imposition of the death penalty.[31] The jury was allowed to dispense mercy, but was given no real guidance about its uses.[32] *Furman v. Georgia*[33] subsequently construed the cruel and unusual punishment clause to forbid standardless imposition of the death penalty. Later death penalty cases, such as *Gregg v. Georgia,*[34] produced plurality opinions upholding the death penalty by requiring consideration of aggravating and mitigating circumstances before imposition of a death sentence.[35] Since a criminal defendant now has a constitutional right to plead for mercy in a capital case as well as a right to trial, the state cannot make him choose one or the other.

Of course, a majority in *Corbitt v. New Jersey*[36] did find *Crampton* an example of a defendant validly compelled to choose between two rights. Nevertheless, the *Corbitt* majority could only have meant to rely upon *Crampton* if it had some bearing upon requiring a defendant to choose between a trial and mercy in a noncapital case, such as *Corbitt,* which involved a mandatory life sentence.

There is considerable difficulty with this use of *Crampton,* however. *Crampton* allowed a state to require a defendant to choose between self-incrimination and mercy in a capital case. The permissibility of this choice rests upon the validity of using a single proceeding to determine both guilt or innocence, and mercy in a capital case, a proceeding *Crampton* allowed. The plurality opinion in

[30] Gregg v. Georgia, 428 U.S. 153, 193, 196-98, 206 (1976); Jurek v. Texas, 428 U.S. 262, 270-71 (1976); Proffit v. Florida, 428 U.S. 242, 251-52 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) (mandatory death penalty for all persons convicted of five categories of first degree murder was invalid because it did not allow appropriate consideration of mitigating circumstances); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (mandatory death penalty for all persons convicted of first degree murder is invalid).

[31] 402 U.S. 183, 207-08 (1971), *vacated in part,* 408 U.S. 941 (1972) (death penalty vacated following the rejection of standardless imposition of the death penalty by Furman v. Georgia, 408 U.S. 238 (1972)).

[32] *Id.* at 194-95.

[33] 408 U.S. 238 (1972).

[34] 428 U.S. 153 (1976).

[35] *See* cases cited note 30 *supra.*

[36] 439 U.S. 212, 218 (1978).

Gregg v. Georgia[37] questioned, if it did not repudiate, the use of a single proceeding for determining both issues in a captial case.

Speaking about the desirability of jury sentencing in capital cases, the plurality opinion of Justice Stewart said:

> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely unsurmountable. Those who have studied the problem suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer.[38]

After a brief explanation, this advice was repeated,[39] although in referring to the bifurcated procedure and related matters, the plurality opinion also said: "We do not intend to suggest that only the above-described procedures would be permissible. . . ."[40]

Nevertheless, the plurality opinion seemed to weaken this disclaimer somewhat in footnote 47[41] on the same page of the opinion. The footnote mentions the single proceeding as well as the standardless sentencing in *Crampton v. Ohio.*[42] It then says that as a result of *Furman v. Georgia,*[43] *McGautha* is "a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases before the Court so as to violate the Due Process Clause."[44] Evidence relevant to punishment in *Crampton,* of course, was not used unless it was also relevant to guilt or innocence.[45] Consequently, *Crampton* did not rule upon a single proceeding involving the use of evidence relevant to punishment, but irrelevant and prejudicial to a fair guilt or innocence determination.

Thus, the three judges who joined in *Gregg's* plurality opinion by Mr. Justice Stewart questioned the fairness of *Crampton's* single proceeding. Two other judges still on the Court, Justices Brennan and Marshall, dissented in *Crampton* on the ground that its single

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[37] 428 U.S. 153 (1976).

[38] *Id.* at 190-91 (footnotes omitted).

[39] *Id.* at 191-92.

[40] *Id.* at 195.

[41] *Id.* at 195-96.

[42] 402 U.S. 183 (1971), *vacated in part,* 408 U.S. 941 (1972) (death penalty vacated following the rejection of standardless imposition of the death penalty by Furman v. Georgia, 408 U.S. 238 (1972)).

[43] 408 U.S. 238 (1972).

[44] 428 U.S. 153, 195-96 n.47 (1976).

[45] 402 U.S. 183, 214, 219, 220 (1971), *vacated in part,* 408 U.S. 941 (1972); *see also id.* at 234 (Douglas, J., dissenting).

proceeding prevented a fair determination of guilt or innocence.[46] On the other hand, four judges now on the Court would have reaffirmed *Crampton's* single proceeding for determining guilt or innocence and punishment in *Roberts v. Louisiana.*[47] In a dissent to *Roberts,* Justice White, joined by Burger, Blackmun and Rehnquist, claimed that the plurality opinion in *Roberts* invalidated Louisiana's capital sentencing statute in murder cases "for want of a separate proceeding in which the sentencing authority may focus on the sentence and consider some or all of the aggravating and mitigating circumstances."[48] It is not clear, however, that the plurality opinion in *Roberts* goes this far.

It has also been said that the plurality opinion in *Gregg* and companion cases displaced or made *Crampton* inoperative, even if they did not reject the case.[49] The reasons given for the displacement are similar to those given in *Gregg* for questioning *Crampton.* Essentially, these reasons are that the later death penalty cases require a far more wide ranging hearing upon the death sentence than *Crampton* required. This hearing involves the consideration of evidence that would be excluded as irrelevant or prejudicial in determining guilt or innocence.[50]

It is immaterial whether *Gregg* and its plurality opinion technically overruled *Crampton* respecting the constitutionality of a single proceeding for determining guilt or innocence, and punishment in a capital case. A legislator cognizant of the *Gregg* Court's doubting comments about *Crampton's* single proceeding would be reluctant to recommend a one stage proceeding in a capital case unless he thought that law were primarily an experiment or an adventure. In any event, the majority in *Corbitt v. New Jersey*[51] made a questionable ruling about plea bargaining by relying upon a precedent, *Crampton,* which seemed discredited until its unexplained reappearance in *Corbitt.*

Bordenkircher and Jackson

The uses of mercy in plea bargaining were also presented in *Bordenkircher v. Hayes,*[52] decided only a term of court before

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[46] *Id.* at 230-31 (Douglas, J., dissenting).

[47] 428 U.S. 325, 356 (1976) (White, J., dissenting).

[48] *Id.* at 356.

[49] *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 73 n.71 (1976).

[50] *Id.*

[51] 439 U.S. 212, 218 (1978).

[52] 434 U.S. 357 (1978).

Corbitt v. New Jersey.[53] The majority in *Corbitt* said that *Corbitt* and *Bordenkircher* were substantially the same case. The opposite decision, however, could have been reached in the *Bordenkircher* case without considering the uses of mercy in inducing guilty pleas. In *Bordenkircher* an habitual offender received a life sentence for forging an instrument in the amount of $88.30 after turning down the prosecutor's comparatively generous offer of a five-year term for pleading guilty to forgery. Initially, the indictment was for forgery only. The prosecutor threatened to get an habitual offender indictment if the plea offer was rejected; the prosecutor carried out his threat. Thus, *Bordenkircher* could have been decided for the defendant on the ground of prosecutorial vindictiveness.

The defendant in *Bordenkircher* argued that reindicting him as an habitual offender after he rejected the prosecutor's plea offer established vindictiveness.[54] The Court rejected this argument since it thought that the prosecutor could have proceeded as he did if the defendant had been initially charged as an habitual offender.[55] Of course, merely reindicting the defendant did not show vindictiveness. The prosecutor's intial evaluation of the offense, however, and his escalation of the offense upon rejection of his plea offer might well have sufficed to establish vindictiveness, as the dissenting Supreme Court Justices as well as the court of appeals maintained.[56]

A plea offer of five years to a defendant whose offense deserves life imprisonment must be a rare occurrence. The forgery statute violated by the defendant prescribed a maximum prison term of ten years.[57] The prosecutor treated the case as one of aggravated forgery until the defendant refused his plea offer. The defendant's rejection of the offer did not change the seriousness of the offense.

The prosecutor admitted that he caused the defendant to be reindicted simply because the defendant wanted a trial.[58] These circumstances reminded the dissenting judges[59] of *Blackledge v. Perry,*[60] in which due process forbade the prosecutor from indicting the defendant for a higher offense because the defendant exercised his right to an automatic trial de novo after having been convicted of the lesser included offense with which he was initially charged. This

[53] 439 U.S. 212 (1978).
[54] 434 U.S. 357, 360 (1978).
[55] *Id.*
[56] Hayes v. Cowen, 547 F.2d 42, 44-45 (6th Cir. 1976), *rehearing denied,* 435 U.S. 918 (1978).
[57] 434 U.S. 357, 358 (1978).
[58] *Id.* at 360.
[59] *Id.* at 365-67 (Blackmun, J., dissenting).
[60] 417 U.S. 21 (1974).

restriction upon the use of the power to indict was held necessary to prevent prosecutorial vindictiveness against a defendant for exercising his trial rights. Thus, prosecutorial vindictiveness is escalation of an offense by the prosecutor beyond its seriousness, as determined by the state's settlement policy, merely because a defendant exercises his trial rights. On the other hand, there is no prosecutorial vindictiveness in a trial and conviction upon the highest offense charged in the indictment after the defendant rejects the prosecutor's generous offer to compromise a weak case.

The dissenting judges in *Bordenkircher* thought that the defendant there deserved the same protection as in *Blackledge v. Perry*.[61] They believed that escalation of the offense after the defendant refused to plead guilty to a smaller offense should have been regarded as vindictiveness unless the prosecutor made some other explanation. This explanation was not forthcoming. Consequently, the dissenting judges in *Bordenkircher* thought that protection against prosecutorial vindictiveness required the case to be settled as a forgery case rather than an habitual offender case. This would have permitted release of the defendant from prison after he served the maximum sentence for forgery.[62]

This resolution of the *Bordenkircher* case, however, would not really have addressed the use of mercy to induce guilty pleas. It would not have been responsive to the case where a maximum sentence is well-deserved unless mitigating circumstances make mercy appropriate. Moreover, it is possible that *Bordenkircher* is not the kind of case where mercy and plea bargaining are usually found hand in hand. *Bordenkircher* may have been merely an isolated lapse from the otherwise impeccable rectitude of a get-tough policy for habitual offenders. In such a case, the state would really have no mercy policy for these offenders; consequently, mercy would have no part to play in plea bargaining with them.

Corbitt and *Bordenkircher* are similar, however, if the mandatory life sentence in *Bordenkircher* was only a mask to hide a general and liberal dispensation of mercy in habitual offender cases. Of course, there are also differences between the two cases. The plea bargaining system in *Bordenkircher,* for example, seemed to have a cutting edge which was not present in the *Corbitt* system. In a *Corbitt* situation, it is possible for a defendant to receive mercy even though he pleads guilty to a first degree murder charge. On the other hand,

[61] *Id.*

[62] 434 U.S. 357, 365-68, 368 n.2 (Blackmun, J., dissenting); *id.* at 368 71 (Powell, J., dissenting).

a guilty plea to an habitual offender indictment in a *Bordenkircher* situation presumably means a mandatory life sentence. Thus, the *Bordenkircher* system leaves the matter of mercy completely in the hands of the prosecutor: the defendant either takes what the prosecutor offers or goes to prison for life if he loses at trial.

The *Bordenkircher* system of plea bargaining, however, does require the prosecutor to plea bargain if he wants to avoid trial. The defendant will receive a life sentence whether he pleads guilty to an habitual offender indictment or is convicted at trial. Consequently, failure of the prosecutor to plea bargain will normally result in a trial because the defendant has nothing to gain by pleading guilty. Moreover, a trial may result in an acquittal.

The *Corbitt* system of plea bargaining does not require the prosecutor to plea bargain in order to get the defendant to plead guilty. Under a *Corbitt* system, unlike a *Bordenkircher* system, the defendant can receive mercy by pleading guilty, and if the prosecutor chooses not to plea bargain, pleading guilty is the only way a defendant can receive mercy. Consequently, if the prosecutor will not plea bargain, the defendant knows that he must either make a blind plea[63] of guilty and hope for something less than a life sentence or go to trial and receive a mandatory life sentence if he is found guilty. In such a situation, a defendant who has a better chance for mercy than acquittal will be under enormous pressure to plead guilty. Moreover the prosecutor does not have to make a plea offer to such a defendant.

The *Corbitt* majority's extreme position proved to be too much for Justice Stewart who had written the opinion of the Court in *Bordenkircher.* Although he concurred with the *Corbitt* majority, he could not accept what he understood its reasoning to be. He hypothesized that this reasoning would allow plea conviction for an offense to be punished at one-half the penalty authorized for trial conviction for the offense.[64]

Justices Stevens, Brennan and Marshall, who dissented in *Corbitt,* found that New Jersey's plea bargaining system was invalid under *United States v. Jackson.*[65] In *Jackson,* the death penalty in the federal kidnapping statute was struck down because it was prescribed only for defendants who were convicted by a jury that recommended a death sentence. Unlike *Jackson's* administration of

[63] State v. Corbitt, 74 N.J. 379, 416, 378 A.2d 235, 254 (1977) (Pashman, J., dissenting), *aff'd,* 439 U.S. 212 (1978).

[64] 439 U.S. 212, 227 (1978) (Stewart, J., dissenting).

[65] 390 U.S. 570 (1968).

the death penalty, New Jersey did not reserve a life sentence in first degree murder cases only for defendants who received a trial; in *Corbitt* the judge had discretionary power to impose a life sentence upon defendants who plead non vult.[66]

The *Corbitt* majority said that this distinguished *Corbitt* from *Jackson.*[67] The dissenting Justices disagreed, contending that a higher standard of punishment for a trial conviction penalized the right to plead not guilty.[68] The majority's basis for distinguishing *Jackson* may turn out to be nothing more than a matter of trivial degree, for it is likely that in New Jersey only a few defendants who plead guilty to first degree murder will receive a life sentence.

Jackson and *Corbitt* are plainly inconsistent. Both cases involve an uneven application of penalties to induce defendants to waive their constitutional rights. Moreover, the pressure exerted upon a susceptible defendant to induce the waiver tends to be irresistible in both cases.

In *Jackson,* the jury had a discretionary power to impose the death penalty.[69] Further, only the jury could impose the penalty.[70] Consequently, a defendant faced a serious risk of receiving a death sentence if he chose a jury trial, a risk which disappeared if he waived a jury.

It would have been possible to correct this uneven application of the death penalty by giving the judge the discretionary power to impose the death sentence in bench trials. Then, a defendant would be exposed to the same standard of punishment whether he was tried by a judge or a jury. Even this corrected situation, however, is not like *Corbitt.* In a *Corbitt* situation, a defendant who chooses any trial, bench[71] or jury, will receive a mandatory life sentence if convicted. On the other hand, he is subject only to a discretionary life sentence if he pleads guilty. The standards of punishment for plea and trial defendants are thus different, just as the standards of punishment for bench and jury trial defendants were different in *Jackson.*

In other words, the flaw in *Jackson* did not seem to lie in that no bench trial defendant could receive the death penalty. The Court, for example, gave no indication that it would have approved a man-

[66] 439 U.S. 212, 215 (1978).

[67] *Id.* at 217.

[68] *Id.* at 229 (Stevens, J., dissenting).

[69] 390 U.S. 570, 570-71 (1968).

[70] *Id.* at 572.

[71] New Jersey law, however, forbade bench trials in murder cases. *See* note 3 & accompanying text *supra.*

datory death penalty in jury trials and a discretionary death penalty in bench trials. In fact, the *Jackson* Court intimated the opposite by deciding that the governmental objective of ameliorating the mandatory death penalty did not justify a discretionary death penalty for only jury trial defendants.[72] Forbidding this kind of amelioration would also invalidate amelioration which made the death penalty discretionary in bench trials and mandatory in jury trials. Finally, inducing bench trials or guilty pleas could not possibly justify what would be forbidden in the interest of ameliorating the death penalty.

Consequently the flaw in *Jackson* was not the mere absence of the death penalty in bench trials for kidnapping. Similarly, *Corbitt* is not without flaw merely because *some* first degree murder defendants who plead guilty will receive the maximum authorized punishment. Instead, the facts presented in *Corbitt* and *Jackson* have the same flaw: a more severe standard of punishment for defendants who do not waive their constitutional rights.

Furthermore, the pressure exerted upon a susceptible defendant to waive his constitutional rights tends to be irresistible in both *Jackson* and *Corbitt* situations. Most persons would willingly forego a good chance for acquittal by a jury in order to avoid certain death if that good chance proved to be disappointing. Similarly, few would throw away a good chance for mercy if the consequence of a mistaken choice meant life imprisonment. The question is not whether a death sentence is more coercive than life imprisonment, but instead whether life imprisonment is coercive enough in some situations. Consequently, it does not seem that the uniqueness of the death penalty distinguishes *Jackson* from *Corbitt* even though the *Corbitt* majority suggested otherwise.[73]

In any event, it is interesting that the *Corbitt* majority said "we need not agree with the New Jersey court that the *Jackson* rationale is limited to those cases where a plea avoids any possibility of the death penalty being imposed."[74] The Court, of course, did not foreclose the possibility of agreement, and it may be called upon soon to decide whether it does agree. In amending its death penalty law, for example, Ohio authorized a more lenient administration of its death penalty for plea defendants than for trial defendants. The validity of this disparate treatment was not decided in a recent case, *Lockett v. Ohio,*[75] which struck down the Ohio death penalty for its

[72] 390 U.S. 570, 581-82 (1968).
[73] 439 U.S. 212, 217 (1978).
[74] *Id.* at 217.
[75] 438 U.S. 586, 618-19 (1978) (Blackman, J., concurring).

unduly narrow prescription of mitigating circumstances. Nevertheless, Justice Blackmun, who voted with the majority in *Bordenkircher* and *Corbitt,* felt compelled in *Lockett* to say that he thought *Jackson* precluded Ohio's more lenient administration of the death penalty for defendants who plead guilty.[76]

PENALTY-INDUCED PLEA BARGAINING

The Efficacy of a Trial Penalty System

The unasked, but answered question in *Corbitt v. New Jersey*[77] was whether the state should be given authority to almost completely replace the trial adversary system of criminal justice with a system of penalty-induced guilty pleas. The Supreme Court at least should have required a showing of actual need to scrap the present trial adversary system before authorizing its destruction. As it was, the Court did not even consider whether some hypothetical need might justify this change.[78]

Hypothetical need might not allow a uniform answer to the question of what should be done when trials impair the administration of criminal justice. There must surely be some units of local government in the country which can control their criminal dockets without the use of trial penalties. On the other hand, the risk to criminal law enforcement presented by universal trials should not be minimized. A defendant who has nothing to lose by demanding a trial may also have no good reason for not making the demand. It certainly seems that trials for all criminal defendants would seriously impair criminal justice administration in some jurisdictions. The enforcement of large segments of the criminal law might have to be forgotten.

The possibility of serious harm arising from universal trial demands by criminal defendants cannot be denied. This possibility is irrelevant, nevertheless, to whether trials should be largely abolished by severe trial penalties in the interest of more effective law

[76] *Id.* The plurality opinion in Gregg v. Georgia, 428 U.S. 153, 183-85 (1976), suggests that the death penalty is appropriate only for persons whose crime is so monstrous that they are not fit to live. This conception of the death penalty ought to make its use as a device to extract guilty pleas in first degree murder cases questionable even though sparing the defendant's life may be the only inducement which would make him plead guilty.

[77] 439 U.S. 212 (1978).

[78] As a plea bargaining case, *Corbitt* was an accident rather than a deliberate, considered response to the problems of plea bargaining. Mandatory life imprisonment for first degree murder in New Jersey came about when the New Jersey Supreme Court prescribed it after United States v. Jackson, 390 U.S. 570 (1968), invalidated New Jersey's death penalty.

enforcement for any particular system of criminal justice. The question here is not what would happen if all defendants suddenly demanded a trial, but whether a severe trial penalty system would result in increased criminal law enforcement. In other words, the inquiry is whether there would be prison sentences or fines for offenses which must now be overlooked with the resources presently available. Consequently, authority to abolish an existing trial adversary system should not be given upon mere request. The administrators of a particular criminal justice system should have to show how many trials could be avoided by a trial penalty system and how many and what kind of plea convictions would result from the time saved by avoiding trials.

Even a severe penalty system would not, of course, eliminate all trials. No trial penalty is likely to induce a guilty plea to the most serious offenses. The punishment for the most serious offenses will be at or near the maximum regardless of whether there is a plea or trial conviction. The pressure exerted by an additional trial penalty would be inconsequential.

It seems unlikely, for example, that a severe trial penalty could affect the disposition of most first degree murder cases when the death penalty is not imposed. Plea bargaining, of course, might remain possible on the basis of the strength or weakness of the state's case or whether the defendant can help to convict others. The threat of five additional life sentences for insisting upon a trial, however, is not likely to induce a guilty plea even if the additional sentences are consecutive. Moreover, absent capital punishment, first degree murder cases would not seem to offer much promise for the operation of a leniency policy if a trial penalty were to consist merely of a denial of leniency. Extending considerable leniency to those who kill deliberately and with premeditation probably would not be cheerfully accepted in any community. Moreover, in other serious felony cases, a trial penalty is not likely to induce a guilty plea from offenders who know that their circumstances require the maximum sentence for their class of offense. The same is true of a defendant whose age will require him to spend all or most of the rest of his life in prison even if he receives a moderate sentence. In short, there must be some cases which the state cannot simply afford to compromise in any way. These cases may be numerous and they do result in trial convictions. They must also be excluded from any computation of the time which might be saved by using severe trial penalties to reduce the number of trials.

One must legitimately wonder how much more criminal law enforcement would occur if the trial system were abolished as fully as

possible by severely penalizing losing trial defendants. Presumably defendants who plead guilty would not be penalized for requesting a preliminary examination when it is available. Further, after the pretrial stages of a case are completed, the extra time spent in trying a case might not bring substantial additional criminal law enforcement. A large part of the increase might reach crimes less serious than those currently disposed of by suspended sentences or probation. Increasing the caseload in these categories would seem to be a poor reason for abolishing the trial system of criminal justice.

Moreover, it ought to be possible to estimate the benefits of largely abolishing the trial system for administering criminal justice. The administrators of any particular criminal justice system, for example, ought to be able to identify the trials that would be eliminated by the use of trial penalties. These administrators also ought to be able to estimate how many more convictions would occur if the time saved by eliminating these trials were used to get plea convictions. Naturally, this would not necessarily show what the loss of law enforcement might be in a system free of trial penalties, for a particular system may contain trial penalties hidden by a discretionary sentencing power.

The projected increase in law enforcement in the form of additional prison sentences or fines for presently neglected offenses could then be seen and evaluated. It is possible that this same increase could be obtained by more direct spending on enforcement. Further, consideration could be given to the possibility of foregoing the projected increase in fines and prison sentences, but calculating this increase and adding it to the punishment of defendants who are convicted at trial. A punishment increase of this kind would be proportionate to the harm done to a criminal justice system by a trial presumed needless. Further, this kind of punishment increase might accomplish the desired reduction in presumably needless trials. It might stop needless trials, for example, as efficiently as the recently recognized power of the trial judge to increase a defendant's prison sentence in proportion to the flagrancy of his perjury when he gives testimony which the trial judge finds perjurious.[79] In fact, this latter power and the power to increase punishment in proportion to the estimated harm caused by a presumably needless trial might eliminate any need for severe trial penalties. Moreover, constitutionally requiring a projection of the benefits of abolishing the trial system before allowing it to be abolished would also set the goals of the new system. A failure to realize these goals might sug-

[79] United States v. Grayson, 434 U.S. 816 (1978).

gest use of the policymaking processes of government to reinstate the trial system. In any event, whatever case may be made for abolishing the trial system of criminal justice has yet to be proven.

It is possible, of course, that a case can be made for abolishing the trial system of administering criminal justice by imposing the most extreme penalties upon defendants who are convicted at trial. Even if this were true, however, the extreme trial penalty systems authorized by *Corbitt v. New Jersey*[80] and *Bordenkircher v. Hayes*[81] have flaws which ought to make them unconstitutional. In both cases, only a small class of defendants were selected for extreme penalties. Further, *Corbitt* did not require the prosecutor to plea bargain.

Other Justifications for a Trial Penalty System

The only justification for extreme trial penalties is that the harm resulting to a criminal justice system from needless trials is serious and incalculable. In other words, the magnitude of the harm is so great that the state must maximize the inducement to plead guilty. This objective cannot be accomplished, however, by using extreme pressure to extract guilty pleas only from defendants in first degree murder or habitual offender cases. Giving extreme plea treatment to only one class of defendants in a criminal justice system is inconsistent with the premise that presumably needless trials threaten the system, for the harm done to a state's criminal justice system by a needless three day murder trial is the same as the harm done by a needless three day trial for unlawful gambling.

Moreover, a plea bargaining system involving a deliberately articulated sentence increase for not pleading guilty seems unjustifiable when the prosecutor has no duty to plea bargain. If the defendant's fundamental trial rights are to be induced away, the state should provide a better substitute than the unconditional surrender of the defendant.[82] It seems unfair to blame a defendant for the consequences of a presumably useless trial when the state refuses to offer an alternative, such as a definite plea bargain, which could avoid these consequences. The state can hardly blame the defendant for refusing to plead guilty when the state itself is not interested in plea bargaining.

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[80] 439 U.S. 212 (1978).

[81] 434 U.S. 357 (1978).

[82] *But see* State v. Corbitt, 74 N.J. 379, 385, 378 A.2d 235, 238 (1977) (Pashman, J., dissenting), *aff'd*, 439 U.S. 212 (1978).

A *Corbitt* system of plea bargaining should require the prosecutor to bargain or explain his refusal to bargain. Further, the plea bargain should offer the defendant a definite sentence and permit him to withdraw his guilty plea if the court fails to approve the plea bargain. Moreover, the prosecutor's plea offer or refusal to bargain should be subject to judicial oversight by the trial judge, and a trial penalty disallowed when the prosecutor's position is found unwarranted.[83] These procedures should minimize prosecutorial vindictiveness in plea bargaining. Of course, in *Weatherford v. Bursey*,[84] the Supreme Court said that criminal defendants do not have a constitutional right to engage in plea bargaining. The defendant there, however, complained that the state's refusal to tell him that his apparent accomplice was a state undercover agent diminished his opportunity to plea bargain. The case did not decide what the state's obligation to plea bargain would be if it chose to eliminate trials as much as possible by inducing guilty pleas.

Systematic statutory or administrative plea bargaining is commonplace in the nation's traffic courts and other courts for minor offenses. Many states, for example, have a two-tier system of criminal justice for minor offenses which permits an automatic trial de novo after conviction in the lower tier and increased penalties for conviction in the higher tier.[85] In most of these systems, the expense to the state of conducting the second trial would probably be an obvious justification for the usual punishment disparity between the two courts. When this is not true, it may be possible to explain the difference in punishments on other grounds.[86]

The kind of sentence increases authorized by *Corbitt* and *Bordenkircher* should be consitutional only if the state can justify them and is willing to engage in good faith plea bargaining with the defendant. Rejection of *Corbitt* and *Bordenkircher* to this extent might also require good faith plea bargaining procedures in plea systems which do not have admitted trial penalties for defendants convicted at trial. It might be impossible to know whether these plea systems have trial penalties if their existence were not officially recognized, for a discretionary sentencing power with a wide range of punishments for similarly situated offenders can make such trial

[83] In states where the jury has a sentencing function, the trial judge could make an appropriate increase or decrease in the jury's sentence.

[84] 429 U.S. 545, 561 (1977).

[85] Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972); *cf.* Ludwig v. Massachusetts, 427 U.S. 618 (1976) (procedural variation).

[86] The actual harm done to a particular criminal justice system by a presumed useless trial, for example, would justify an appropriate penalty increase.

penalties invisible. Moreover, the Supreme Court has said that plea bargaining should not be conducted in the shadows.[87] Invisible trial penalties will remain possible, however, in plea systems where trial penalties are not admitted, unless safeguards against the abuses of visible trial penalties are required for these systems.

CONCLUSION

There may be an urgent need to reduce trial caseloads among the nation's criminal justice systems. In view of the Supreme Court's natural reluctance, however, to reconsider recent matters which it has solemnly decided, the extent of this need may never become known. The Court has authorized the use of trial penalties to erode the trial system of criminal justice without any showing of need, without requiring a rational use of trial penalties and without any protection of the interests of the defendant. Thus, the fundamental right to a trial in a criminal case has been dispatched without even so much as the ceremony or explanation which usually attends the obliteration of nonfundamental interests, which may permissibly be destroyed when there is a rational basis for doing so.[88]

The state has been given the maximum power to resolve the problems and aggravations of plea bargaining. The Supreme Court has gratuitously handed the state a broadsword when a scalpel might do the job. Perhaps the state may find it unnecessary to use the broadsword even if the Supreme Court does not take it back.

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[87] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[88] Maher v. Roe, 432 U.S. 464, 468-71 (1977) (because state welfare benefits are not a fundamental right, a state does not have to fund nontherapeutic abortions for indigent mothers when it pays childbirth expenses for indigent mothers); Massachusettes Bd. of Retirement v. Murgia, 427 U.S. 307, 315-17 (1976) (physically fit policemen can be forced to retire at age 50).